

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 7, 2006

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Carpenters Local 542
(Wohlsen Construction Company) 560-7540-8060-5000
Case 4-CC-2449 560-7540-8070-5000

The Region submitted this case for advice as to whether the Union's picketing at the entrance to a private road leading into a hospital complex, rather than at a primary gate established within the complex at a driveway entrance from that private road, violated Section 8(b)(4)(i)(ii)(B). The primary gate was thereafter moved within 9 days to the location where the Union was picketing. We conclude that the charge should be dismissed, absent withdrawal, since it is a close case under Board law as to whether the primary gate on private property was too remote from the public so as to justify picketing at the closest intersection with a public road and since, with the moving of the primary gate, it would not effectuate the purposes of the Act to issue complaint.

Briefly, the general contractor for the construction of two additions to a hospital hired a carpentry subcontractor, with whom the Union has a primary area standards dispute. There are two private roads leading from the public highway in front of the hospital into the complex; one leads directly into the parking lots for the hospital, while the other road leads eventually to a complex of doctors' offices behind the hospital (and may lead to other facilities beyond). Between the private road's intersection with the public highway (that intersection is Location 3) and the doctors' offices, there are three driveway entrances (Locations 4, 5 and 6) from that private road that lead into the hospital emergency room entrance or more parking lots.

When the Union picketed at the front of the hospital on December 7, 2005, the general contractor and the hospital set up a reserved gate system. The entrance from the public highway to the first private road was designated as the neutral gate, and had a sign stating that the primary subcontractor and its employees, customers and visitors "may not use this gate". Along the second private road, the furthest back from the public highway of the three driveway entrances from that road into the hospital parking lots (Location 6) was designated as the primary gate. A sign at Location 6 stated that the primary subcontractor and its employees, customers and visitors must use that entrance. There were no signs at Locations 3, 4 or 5. The total distance between Location 6 and Location 3 (the entrance from the public highway to the private road) is not given, but Location 6 is at least 120 yards back along the private road from a bus stop, which is on the private road.

By letter dated December 7, the general contractor notified the Union that the Location 6 gate had been established for use by the primary (and attached a map showing the gate); the letter asked the Union to "please confine any picketing to [that gate] according to law." While the letter from the general contractor did not state that the hospital would allow Union pickets onto the private road and gate, the Union has not argued it picketed elsewhere to avoid a trespass claim.

On December 7, and on subsequent days, the Union picketed at the public highway/private road entrance intersection at Location 3 rather than at the primary gate at Location 6. On December 9, the general contractor sought a state court injunction, resulting in a consent order limiting the Union to four pickets at Location 3. On December 16, the general contractor notified the Union that it was moving the primary gate from Location 6 to Location 3, where the Union was already picketing. The Union continued to picket at Location 3; there is no contention that such picketing after December 16 was unlawful. There is no evidence that the primary did not use the Location 6 primary gate from December 7 through December 15. There is also no evidence that the Union's picketing caused any employee to cease working or making deliveries.

We conclude that the charge should be dismissed, absent withdrawal. It is a very close issue under Board law as to whether the Union could lawfully picket at Location 3, at the entrance to the private road, rather

than directly at the primary gate established at Location 6, remote from the public highway. While the Board does not allow a union to picket away from a reserved primary gate on a public street simply because another location would be more effective in reaching the public in addition to reaching the primary's employees, suppliers and customers,¹ a primary gate established on private property may be too remote from which to appeal to the general public. Thus, in Electrical Workers IBEW Local 453 (Southern Sun), the Board found that a primary gate established in a private alley "would unjustly impair the effectiveness of [the union's] lawful picketing."² The Board has characterized Southern Sun as not holding that "a primary reserved gate on a public road is established improperly simply because there is little traffic by the general public at the primary reserved gate."³ Here, however, the primary gate was established on a private road remote from a public street; thus, the issue is close of whether the Union could lawfully picket at the nearest intersection with a public street, particularly when the Union did not picket at the neutral gate.⁴

In any event, within 9 days the primary gate was moved to the Location 3 intersection where the Union was picketing in compliance with the state court order. Again, there was no evidence of impact during those intervening

¹ See, e.g., Electrical Workers IBEW Local 501 (C.W. Pond Electric), 269 NLRB 274 (1984), enf. denied and remanded for factual resolution 756 F.2d 888 (D.C. Cir. 1985).

² 237 NLRB 829, 830 (1978), affd. per curiam 620 F.2d 170 (8th Cir. 1980)..

³ Electrical Workers IBEW Local 501 (C.W. Pond Electric), 269 NLRB at 274, 278 (emphasis added)(violation to picket at neutral gate, when primary gate was established on a public street even though there was "extremely light traffic" on that public street).

⁴ Cf. Electrical Workers IBEW Local 970 (Interox America), 306 NLRB 54, 60 (1992), where both the neutral and the primary gates had been established along the same private access road; the union picketed at the intersection of the private access road and the public road from which it led. The Board found that on those particular facts of "geographical limitations", the Congressional objectives "are more nearly attained" by finding the picketing there unlawful. 306 NLRB at 60.

days from the picketing at Location 3. In all these circumstances, the charge should be dismissed, absent withdrawal.

B.J.K.